UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matters of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- -x

In the Matters of:

LEHMAN BROTHERS INC.,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

September 14, 2011

10:02 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

HEARING re Debtors' Motion for Approval of a Modification to the Debtors' Disclosure Statement [Docket No. 19813]

HEARING re Motion of the Official Committee of Unsecured Creditors of Lehman Brothers Holdings Inc., et al., for Entry of an Order Granting Leave, standing and Authority to Prosecute and, if Appropriate, Settle Causes of Action on Behalf of Lehman Commercial Paper Inc. [Docket No. 19622]

HEARING re Motion of Insured Persons for an Order Modifying the Automatic Stay to Allow Settlement Payment Under Directors and Officers Insurance Policy to Settle New Jersey Action [Docket No. 19480]

HEARING re Debtors' Motion to Compel Production of Documents Improperly Withheld as Privileged by Giants Stadium LLC [Docket No. 19585]

HEARING re RBS N.V.'s Motion for Order Dismissing, Without Prejudice, the LBI Trustee's Motion, Dated June 29, 2011, or Alternatively, Converting the LBI Trustee's Motion to an Adversary Proceeding Complaint, Requiring Application of Certain Bankruptcy and Local Rules, and Staying all Non-Discovery-Related Proceedings in Respect of the LBI Trustee's Motion Pending a Determination by the District Court with Respect to RBS N.V.'s Motion to Withdraw the Reference [LBI Docket No. 4454]

Adversary Proceeding: 10-02821 Lehman Brothers Holdings Inc. v. J. Soffer, Fountainebleau Resorts, LLC

Pre-Trial Conference

Adversary Proceeding: 10-02823 Lehman Brothers Holdings Inc. v. J. Soffer, Fontainebleau Resorts, LLC

Adversary Proceeding: 11-01875 Melissa King v. Lehman Brothers Holdings Inc.

HEARING re Lehman Brothers Holdings Inc.'s Motion to Dismiss

Transcribed by: Aliza Chodoff

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

Mr. Perez.

MR. PEREZ: Good morning, Your Honor. Alfredo Perez on behalf of the debtors. Your Honor, we're here on the motion to approve a very slight modification to the disclosure statement on a show cause order. I appreciate the Court hearing us so quickly.

After the disclosure statement here and we went back and someone brought to our attention that the description of what was a senior guarantee claim included securities lending, and there was a question as to whether in fact that should be treated as a senior claim. So the purpose of this amendment is strictly to take that out of there.

Your Honor, several people have called and said well, what's this about. Basically, Your Honor, the reason this came up was to determine what ballot the individuals get. Do they get 5 -- Class 5 ballot or do they get a Class 9-A ballot? And the people who would otherwise fit in this are going to receive a 9-A ballot. And in essence, Your Honor, the definitions of senior claim is for borrowed money, indebtedness for borrowed money. And these are situations where you would enter into an agreement where you would lend securities in return for collateral, and there's a question as to whether in fact that is for borrowed money.

Your Honor, several people wanted me to state on the record this doesn't affect anybody's substantive rights. I mean, the plan says that we're going to enforce the subordination provisions. This was included, I believe, at the request of the committee or maybe some other parties to explain what types of transactions would fall into the various classes. And we just eliminated it. We didn't put it in another class; we eliminated it.

But nobody's substantive rights are being affected here, number one. And number two, the ability to challenge classification, as the Court is aware, has been deferred to confirmation. That's a proper confirmation. So if somebody receives a Class 9-A ballot, thinks they're a Class 5, they have the ability to raise that.

But with that, Your Honor, that's all the presentation that we have.

THE COURT: Okay. I read the statement that was submitted I suppose overnight, I received it this morning, indicating no objection but also reserving rights, and to some extent, this is a ministerial matter.

The Court reviewed this proposed change and determined that it was probably outside the boundaries of the kind of adjustment that was authorized under the original disclosure statement order and as a result urged the debtor to proceed by means of order to show cause to list this today so

that all parties would have actual notice of the proposed change. I recognize that the committee's papers indicate that from an economic prospective these changes appear to be de minimis. From a structural prospective, however, I believe they are nontrivial, and so we requested that you proceed in this manner.

I've reviewed the proposed changes and I've taken into consideration the committee's statement as well as your presentation, and the proposed amendments are approved.

MR. PEREZ: Thank you, Your Honor. Your Honor, I have an order, but on the basis of your oral ruling can we go ahead?

THE COURT: Yes.

MR. PEREZ: We have been waiting to print or burn the CDs, but on the basis your order --

THE COURT: Go print.

MR. PEREZ: Thank you, Your Honor.

UNIDENTIFIED SPEAKER: Your Honor, the next matter is Mister --

THE COURT: Are you actually going to print now?

MR. PEREZ: No.

MS. WALSH: I just wanted to put my appearance on the record if I may?

THE COURT: Sure.

MS. WALSH: Good morning, Your Honor. Christine

Walsh of Mayer Brown on behalf of BNP Paribas and Affiliates. I just wanted to place on the record we, of course, do not object to the motion but just wanted to confirm the reservation of rights with respect to this at a later time. So I appreciate your time. Thank you.

THE COURT: Okay.

MR. O'DONNELL: Good morning, Your Honor. Dennis O'Donnell, Milbank, Tweed, Hadley, McCloy on behalf of the committee. The next item up is, as Mr. Perez indicated, our motion, the committee's motion seeking authority or seeking standing to prosecute certain adversary proceedings on behalf of LCPI.

This is a motion that is being made with the consent of the debtors. And in the papers we submitted, I think we've laid out how we have satisfied the applicable standards under STN and Commodore in terms of there being colorable claims here and the benefit to the estate together with the consent of the debtors. The motion was filed on August 31st. There have been no objections.

I would just briefly by terms -- in terms of background, it relates to claims that arise out of certain participation agreements that were entered into with parties under LMA forms. And under these LMA forms, the parties did not get a property right; they got a debtor -- they got a claim essentially. It was a debtor-creditor relationship created.

The contention in the adversary complaints that have been filed to date and the claims that will potentially be asserted to -- against parties who have signed tolling agreements arise out of that relationship and elevations that were granted by the debtors during the preference period were in certain cases post-petition, which we contend are avoidable as preferences or unauthorized post-petition transfers.

As indicated, there have been five adversaries filed already. Those have been stayed under the order staying the adversary proceedings. And there are tolling agreements with respect to approximately 13 other parties, which with whom the debtors and we have been in contact.

The committee is assuming prosecution of these claims primarily because it has taken the lead with respect to these claims since the outset going back approximately a year and a half. The committee was involved in the initial investigation and was most focused on these particular claims and has continued to be involved. And given that background, this motion -- as well as just recognizing the status quo, the committee will, the committee has been pursuing the claims. They will continue to pursue the claims.

As indicated, the objection deadline was September 7th. There have been no objections. The debtors have consented. So unless the Court has additional questions about the claims or the relief sought, we would request that the

Court grant the motion.

THE COURT: I have no problem with the motion, and I'm prepared to grant it. But I did have a question when I reviewed it because it wasn't obvious to me as to why the committee was pursuing these claims as opposed to LCPI itself. And since that was not clear to me, I'd like you to make it clear now.

MR. O'DONNELL: Sure. As I've already indicated, Your Honor, during the process leading up to the bar date for the filing of avoidance actions, we -- there was a certain amount of divvying up of responsibility for different types of claims. And the committee initially raised the potential theory here and persuaded the debtors to pursue the theory. The claims that were filed were filed by the debtors.

In the months that have ensued, there has been, again, a sort of allocation of responsibilities or focus by either the committee or the debtors on various of the avoidance actions. This is -- these are avoidance actions that the committee initiated the investigation with respect to and has always felt most strongly about. We believe that the theory here is very viable and that there are no colorable defenses. The debtors, recognizing our involvement and commitment of time and effort thought it made sense for us to continue that prosecution and have consented.

THE COURT: Okay. I'll accept that as an

explanation, and the motion is granted. You have authority to proceed with prosecution of those causes of action.

I do have a question, however, relating to the agenda. And this is probably a question for Mr. Perez. I remember that one of the items that I prepared for on the uncontested list, which is not on the amended agenda, gave the debtor permission to serve certain foreign defendants in connection with some pending litigation. I believe one of the parties was BlueBay, and BlueBay was also identified as a party in the motion that we just heard giving the committee authority to proceed.

I'm just wondering what happened to that. Was that resolved by other means?

MR. PEREZ: Your Honor, if the Court will give me five minutes I'll go find out because I don't know the answer to that. I can make a call.

THE COURT: I don't know if it was resolved by certificate of no objection that I didn't hear about but --

MR. PEREZ: It was.

THE COURT: Apparently it was my law clerks have confirmed that. Fine. Then I withdraw the comment and you don't have to look further.

MR. PEREZ: All right. Thank you, Your Honor. Your Honor, may I be excused?

THE COURT: Yes.

MR. PEREZ: Thank you.

THE COURT: You're going to go print.

UNIDENTIFIED SPEAKER: Your Honor, the next matter on the agenda is the motion of the insured persons for order modifying the stay. I don't know who is actually presenting that motion.

MR. WASSERMAN: Hi. Good morning, Your Honor. My name is Adam Wasserman. I'm of Dechert LLP. I will be presenting that motion. We represent the current and former directors of LBHI, who are the defendants in the New Jersey action. The motion is also being made on behalf of the various officer defendants in that action as well.

I'm going to do my best to keep this very short. As the Court is aware, on nine prior occasions it has provided a comfort order lifting the automatic stay to the extent necessary in order to permit the insurers to pay settlements and/or legal fees from the LBHI D&O policies. Here, the current and former LBHI officers and directors seek very similar relief in connection with a settlement that was reached of a securities action brought by the State of New Jersey Department of Treasury, which settles a case that has about approximately 192 million in alleged claims for 8.25 million dollars.

I am not going to repeat for you all the reasons in our moving papers for why we think the comfort order is

appropriate. I'll rest on those. Rather, I will just address the one limited objection that was raised by the Essex plaintiffs to this motion.

The Essex plaintiffs' limited objection is essentially that they do not know whether or not the New Jersey settlement should be covered by the 2007/2008 D&O policy or whether it should be covered by the 2008 to 2011 D&O policy. Another way to put it is they're not sure if it should be covered by tower one or tower two, to use short firm.

We believe that this objection should be objected for three reasons. The first is this very same argument was previously raised in oral argument by the objector to the 15 million U.S. Air comfort motion in July, which this Court had rejected. And we believe that the argument should be rejected here for those same reasons as well.

THE COURT: And that objector is the very same party who is benefiting from today's settlement.

MR. WASSERMAN: That is, Your Honor, the State of New Jersey.

The second reason is that we believe that Essex lacks a legal basis to object to the comfort motion for the exact same reasons that New Jersey previously lacked standing. Essex is not an insured whose case is even claimed to be covered under the policy, but rather it is a Plaintiff in a ongoing arbitration where there has been -- and the arbitration is

against certain LBI brokers. And there has been no resolution of that arbitration to date. Thus, as this Court stated in court in July, they're merely one representative of a whole host of third parties who might have claims that could proceed against -- claims against the proceeds of the insurance policy and thus, they would lack standing to object.

The third reason their objection should be denied is that absolutely no one is claiming that the New Jersey case is not covered by tower one, the 2007/2008 policy. The estate I believe agrees. The New Jersey defendant agrees. The insured agrees, and you don't even have Essex saying that they disagree.

So under the circumstances where there is absolutely no question that this settlement is covered by the 2007/2008 policy, we think that their objection should be denied. And unless this Court has any questions, I will just respectfully ask that the order be granted.

THE COURT: I'll hear from Essex. But before hearing from Mr. Duffy to the extent he wants to say a few words, I'd like to hear from the insurer, assuming the insurer is represented in court, on the proposition that you've just advanced in argument which is the coverage question that is embedded in the Essex objection. In effect, Essex is saying it's not clear to us that your term tower one applies. Frankly, it's the first term I've -- first time I've used the

term tower one to describe an insurance stack, and I'm not comfortable using that term. So I'm not going to do it again particularly --

MR. WASSERMAN: Yes, Your Honor.

THE COURT: -- in a week that includes September 11. But I'd like to hear from the insurer. Is the insurer here?

Apparently, the insurer is so lacking in concern about the coverage question that the insurer is unrepresented; is that correct?

MR. WASSERMAN: I am not sure if the insurer is represented. I know that we have insurance counsel for the estate present who can address that issue. And I am happy to address our understanding of that issue if it pleases the Court.

THE COURT: I'm not looking for an evidentiary showing on the question of coverage as much as I'm trying to get a sense as to whether or not the Essex objection is purely theoretical or if there's any substance to it.

MR. WASSERMAN: Well, the basis why we believe it is theoretical and that there isn't any substance to it, Your Honor, is that according to the insurers there was a case filed in February 22nd, 2008, which was the Reese case, which was a securities class action, which would have been covered by the 2007/2008 policy.

It is our belief and I believe it is also the

estate's belief, though I will let the estate speak for itself, that the Reese case involved securities questions, which related to allegations relating to LBHI securities and relating to whether or not there were misstatements or omissions in connection to Lehman's financial condition and/or exposure to mortgages. So that is the initial case, which triggered the 2007-2008 policy.

The New Jersey case, similarly, is a case by an investor who is claiming a securities case against the defendants. And their case is also based on the similar types of alleged misstatements and/or omissions relating to Lehman's or LBHI's financial condition and/or exposure to various mortgage and real estate assets. So because the New Jersey action is related to this action that was first filed in what is a claims made policy, it is our understanding that it is in fact covered.

And I will defer to either counsel for the estate or counsel for -- or insurance counsel for the estate if you have any additional questions on that.

MR. KRASNOW: Good morning, Your Honor. Richard Krasnow, Weil, Gotshal & Manges on behalf of the debtors. We are not insurance counsel, but just a few introductory comments.

Your Honor, the debtors have no objection to the granting of the motion for the reasons that Mr. Wasserman

outlined. And we concur with his views with respect to the one objection that was filed.

I would make one observation in response to Your Honor's question as to whether or not this is a theoretical issue. Your Honor, we believe that Essex, if you will, stands in the shoes that New Jersey wore when it opposed the last motion where relief was sought to lift the stay to allow for insurance payments to be made, which is to say that ethic, excuse me, Essex's standing is nonexistent.

It does -- it has asserted claims. There is litigation with respect to its claims. But it has no rights with respect to either the policies at issue or the policies that it alluded to, which I believe is the 2008/2009 policy years.

With respect to the 2007/2008 policy years, I will defer to Mr. Hirsch from the Reed Smith firm, who is insurance counsel to the debtors. But again, my understanding is consistent with what Mr. Wasserman said, which is that the claims that have been asserted by New Jersey are similar to claims that were previously asserted during the 2007/2008 policy year. And therefore, under the policies in question and applicable insurance law, there is a relation back.

Your Honor, if I could introduce Mr. Hirsch, he is with the firm of Reed Smith. It wasn't clear that he was going to need to speak today. He is admitted in the State of

Illinois. He is not admitted in New York. We had not filed any pro hac papers because it might just be a one-day matter. But we would request that he be admitted pro hac for the purpose of today's hearing.

THE COURT: He's --

MR. HIRSCH: Good morning, Your Honor.

THE COURT: He's admitted pro hac, and he needs to recognize that that carries with a $200 payment obligation.

MR. HIRSCH: I think my firm can cover it, Your Honor.

THE COURT: Good. And we appreciate all contributions to our treasury.

MR. HIRSCH: Your Honor, Mr. Wasserman I believe did state accurately why the New Jersey matter should fall within the '07/'08 tower. I can answer any other questions you have if you have any. But I'd also say there really isn't any dispute on behalf of the estate. If there were a basis to dispute, then I think we would. It would be in the estate's interests. But there really isn't.

THE COURT: Okay. I -- Mr. Duffy can speak for himself, but I view his limited objection as being more in the nature of a reservation of rights as to whether or not a particular claim is covered under the 2007/2008 policy or under the 2008/2011 policy. Is there any current question in the mind of the debtor or, if you know, in the mind of the

insurance carriers and their representatives as to applicable coverage concerns?

MR. HIRSCH: No, there is no question. And I know the position of the insurance carriers because we have correspondence from the insurance carriers. There's no dispute. They took -- the insurance carriers took the position that this matter is in the '07/'08 tower because it relates back to claims first made during that policy period. And again, that's reflected in correspondence. And neither the estate nor any of the insureds has disputed that.

THE COURT: Okay. I appreciate your comments.

MR. HIRSCH: Thank you, Your Honor.

THE COURT: I'll hear from Mr. Duffy. But I'll hear from Mr. Duffy on the same basis that I heard from the State of New Jersey on July 21.

MR. DUFFY: Yes, Your Honor. For the record, Todd Duffy, Anderson Kill and Olick on behalf of Essex Equity Holdings Limited.

Our objection is, as the Court rightly characterized it, was more of a reservation of rights. We believe that there will be a policy question as to which policy these charges will be associated with and not only these but others. If you see the SASCO objection, they say they've been stuffed into the 2007/2008 tower when they really believe that they should be in the 2008/2009 -- or 2008/2009 tower.

Now, all of these representations on the record from the debtors' insurance counsel, Mr. Wasserman, they were not in the papers. So we contacted or reached out to debtors' counsel and asked could we see the notice of claim, which usually comes from the risk managers. We received nothing.

So I am not an insurance coverage attorney, but our concern is merely that it's not to object to this -- to the Court entering any order granting -- lifting the stay for the settlement. Our objection is that -- our concern is that later on someone will use this order to say this esteemed Court said that this belongs in the 2007/2008 policy tower. And this simple reservation of rights in the order, I don't see why anybody -- if in fact this is the correct tower, I don't see why anybody else would have any objection to that. Thank you, Your Honor.

THE COURT: Okay.

MR. HIRSCH: Your Honor, may I step up just to clarify one matter? I want to be absolutely clear on this. When I answered your question a moment ago, I understood you were asking about the New Jersey case, which is what we're talking about now.

There is a coverage dispute, not before Your Honor right now, regarding whether or not the -- what we call the SASCO litigation, the mortgage-backed securities cases, whether that falls under the '07/'08 tower or the '08/'09 tower.

There's a large dispute about that. I wasn't addressing that, and that's not before Your Honor at this moment.

THE COURT: Understood. Thank you.

MR. DUFFY: Your Honor, may I have one moment? I'm sorry.

THE COURT: All right. It has to be quick. This is -- we're already spending more time on this than I think it probably warrants.

MR. DUFFY: Yes, Your Honor. Someone mentioned the Reese case previously. And honestly, I think that the Reese case may involve securities questions that are similar to this question. But I -- my understanding from my insurance coverage partners is that that type of, quote, notice to the insurance company suspect, that it's not always considered rock solid notice of claim. So as a result, there may actually be a question, but I don't have anything in front of me to question that.

THE COURT: Look --

MR. DUFFY: Thank you, Your Honor.

THE COURT: -- I've heard enough on this whole subject. This is not a hearing to determine a coverage dispute nor as far as I can tell in the matter before the Court is there any coverage dispute. In fact, based upon the representations of counsel for the insured persons, for the estate, both general bankruptcy counsel for the estate and

special insurance counsel for the estate, there is no question but that the proposed settlement to be authorized by virtue of granting the motion is a settlement that falls within the 2007/2008 D&O coverage.

However, one thing is clear. The motion itself is a motion for what we conveniently describe as a comfort order that authorizes the parties-in-interest to proceed with the proposed settlement but in no way constitutes a determination as to underlying insurance coverage issues. That's a matter that I presume the parties have satisfied themselves is not an issue. Also, I will note for whatever it may be worth that at least in my experience, an insurance carrier rarely if ever will pay out significant settlement proceeds whenever there is a legitimate coverage dispute then pending without involving other carriers that might share the load.

So without ruling on the question, I do overrule the Essex Equity Holdings limited objection. And I'm satisfied by the representations that I've heard that there really is no coverage issue here. However, even if there had been no objection by Essex Equity Holdings, the grant of this motion would not have constituted and does not constitute a determination of any coverage issues. That's one of the reasons why this has been largely a waste of time. The motion is granted.

MR. WASSERMAN: May I approach to give a CD to your

clerk?

THE COURT: There's actually no need for you to do that because the ordinary course action in our omnibus calendar is to collect the orders and hand them up at the end of the morning calendar. And in the ordinary hearing, Weil Gotshal acts as the keeper of the proposed orders. So you can hand that to one of the Weil Gotshal partners, and they'll take care of it.

MR. WASSERMAN: Thank you, Your Honor.

THE COURT: And you're excused if you want to me. And, Mr. Duffy, you're excused if you want to be.

Good morning.

MR. SLACK: Good morning, Your Honor. Richard Slack from Weil on behalf of the debtors. The next matter concerns a very narrow discovery dispute between the debtors and Giant Stadium LLC concerning whether Giants Stadium can withhold certain documents as privileged that were shared with Giants Stadium's financial adviser, Goldman.

In May 2010, the debtors served a subpoena on Giants Stadium pursuant to Rule 2004 and this Court's November 2009 order permitted the debtors to take 2004 discovery. The result of that subpoena was a fairly extensive production by Giants Stadium that was reviewed. There was a 2004 examination of a witness.

Now, the discovery that was served was done so in

connection with swaps that Lehman had entered into with Giants Stadium. In a nutshell, Giants Stadium financed the building of a new stadium in New Jersey by issuing auction rate securities, and auction rate securities are long-term debt interest instruments for which the interest rate is regularly reset through an auction process. And because of the potential interest rate fluctuations, Giants Stadium sought to limit their interest rate exposure by entering into swaps. And they did so by entering into some swaps with Goldman, which had some of the auction rate security risk, and some of those were hedged with Lehman in separate swaps.

Now, upon the Lehman bankruptcy, Giants Stadium sought to terminate the swaps as did, as we know, a number of Lehman swap counterparties. There were certain contractual provisions in the governing documents between LBSF and Giants Stadium, which add some complication. And I'm not going to go through them, but one example is there was a provision in the governing documents that had LBI acting as the auction agent for the auction rate securities. And the provision stated that if for some reason LBI was no longer the auction rate agent that the interest rate on the Lehman swaps would change from one that was based on the actual auction rates that were set to a LIBOR rate. And the importance of that is, is that in this situation after the Lehman bankruptcy, a matter of days afterwards, LBI in fact resigned and shortly thereafter was

replaced.

So one of the matters, and it is just one and it's an example, in the debtors' investigation is what were the assumptions that underlie the valuation of the swap upon termination by Giants Stadium and in particular if the swaps were set to go out let's say 38 years or so, which is these were 40-year swaps so they still had 38 years left, and you're valuing them, how did Giants Stadium take into account the fact that upon the resignation of LBI it was expected that there would be a change and would there be a change in the interest rate essentially in their calculation. So if they did that, great. If not, why not. And that's one of the issues that we're looking at in the 2004 investigation.

Now, not surprisingly, upon the termination that Giants Stadium sought, Goldman prepared the valuation of the swaps. So the financial adviser actually prepared the valuations. And those valuations became the basis for Giants Stadium's 300 million dollar claim that it filed in the bankruptcy.

Giants Stadium has produced the valuations that Goldman did. Your Honor, what we did was in our exhibits we submitted the cover e-mails and didn't burden the Court with the actual valuations, which are quite substantial. But we have those here if the Court would like to see those. But the bottom line is, is that Giants Stadium produced the Goldman

valuations. They -- you know, one of the issues, again, that we're looking at in our investigation is what were the assumptions that went into the valuations and why those assumptions were made by Goldman. Of course, that's all classic financial adviser work.

Giants Stadium ultimately produced a extensive privilege log. And this motion only seeks thirty-three documents on the Giants Stadium log where Goldman was a party to the communication, so again, a very narrow motion.

With that, there is a little bit of cleanup for two reasons. Number one, yesterday Giants Stadium produced four of the thirty-three documents that were at issue. So as they had said I think in their objection they were going to do, they in fact produced those. And for the record, we've identified those as Exhibit 351 off of the privilege log, which is -- was Exhibit D to our motion, and Numbers 270, 271 and 272 off the redaction log. So those, Your Honor, are no longer at issue. They have been produced.

The other thing is, is that the list that we had in our motion of the documents is accurate. That's at page 10 of our motion. We had an exhibit for Your Honor, which we thought would be helpful, where we highlighted on the privilege and redaction logs the items that were at issue, and we mismarked Number 197. We actually highlighted that one on Exhibit E, but that is not at issue. So Number 197 off the redaction log is

not at issue.

So turning to the law for a second, there really is no dispute as to the general rule that the presence of a third party in communications between a lawyer and the client destroys the privilege. In the Second Circuit, there is a very limited exception to that. And again, I don't think is at issue as Giants Stadium has said that they accept the Kovel and Ackert decisions as being the law. And that is that where you have essentially a client who needs an interpreter, then there is a very limited interpreter exception to this idea that a third party destroys the privilege. And when the courts in Kovel and Ackert use the word interpreter, they're talking about obviously non-language interpreters.

And Ackert, which is a Second Circuit decision I think, is an important case in terms of the facts there. You had an in-house lawyer for a company which sought to advise the company about tax implications of a certain investment. And in the course of providing that legal advice, the in-house lawyer contacted Ackert, who was an employee coincidentally at Lehman or at Goldman. And the company argued that the information provided by the financial adviser was both important and necessary to rending the legal advice by the lawyer.

Interestingly enough, the lower court agreed and held that the information was privileged. The Second Circuit reversed. And relying on Kovel, the Second Circuit held that

communications between a party and its counsel may not be destroyed if the third-party adviser was acting as an interpreter akin to a client speaking a different language. The Second Circuit found, however, here that, quote, "the privilege protects communications between a client and an attorney not communications that prove important to an attorney's legal advice to the client." And the Second Circuit went on to say the communication between an attorney and a third party does not become shielded by attorney-client privilege solely because a communication proves important to the attorney's ability to represent the client.

And here, this situation is no different than in Ackert. The declaration of the lawyer here from Sullivan and Cromwell submitted by Giants Stadium in opposition to the motion confirms, frankly, that the communications do not fall within the Second Circuit's holding in either Kovel or Ackert. In Paragraph 15 of Mr. Dietderich's declaration, he states, quote:

"These seven communications represent legal discussions among S&C, Goldman Sachs and GS LLC in which S&C required the assistance of an expert on financial markets in order to provide certain advice to GS LLC concerning the amount of loss as that term is defined in the ISDA agreements suffered by GS LLC due to LBSF's default on the transactions. This financial expertise was provided by Goldman Sachs at the

request of GS LLC solely for the purpose of assisting S&C to adequately advise GS LLC on legal questions."

And this is precisely the situation in Ackert. By its own admission, Sullivan and Cromwell wanted financial advice that it thought would be useful, perhaps even necessary, in rendering legal advice. And that's exactly what happened in Ackert where the in-house lawyer wanted Goldman's financial advice on taxes in a transaction at issue there in order to help it render legal advice.

I would also point out, Your Honor, though I won't read it, that you have a very similar description of the work done by Goldman in these communications in the declaration by Christine Procops in paragraphs 18 and 19 essentially saying that what was being provided was financial advice by Goldman to help the lawyers render legal advice. And that is not privileged under Ackert or Kovel. The only thing that is privileged potentially in the limited exception under Ackert is where the client is providing information and it's being interpreted by the financial adviser. But as in Ackert, when you're getting financial advice from the financial adviser, that is not privileged.

Now, the withholding of this information here is even more egregious than in Ackert or in Kovel, and the reason is, is that Giants Stadium has actually produced certain valuations and certain valuation information while trying to hide other

information on exactly the same topic.

THE COURT: This is your sword and shield argument.

MR. SLACK: That's correct.

THE COURT: One of the questions I have, I want to go back to your opening remarks about the four documents that have recently been turned over. So there are now twenty-nine by my count of these documents that are at issue. What distinguished those four documents, and what if anything did you learn about the role of Goldman as a result of looking at those four documents?

MR. SLACK: Well, I think in fairness we looked at the documents and we didn't even see a colorable argument that -- from those four documents that they were being withheld under Kovel. I don't know whether -- I think they're confidential, and I don't know whether I can describe them to the Court. But I -- what I guess I would suggest is that after the motion we will submit them to the Court and the Court can review them.

THE COURT: Okay. And apropos of that last remark, I gathered from looking at the papers that have been filed that there is some ongoing issue as to whether or not the disputed documents should be the subject of an in-camera review. How can I possibly decide the question of privilege here and the role of Goldman without an in-camera review?

MR. SLACK: I think, Your Honor, that it's -- the

answer is I think it's entirely appropriate. I think Your Honor should take them in-camera.

I think Your Honor could decide it without it in the following respect, and that is that based on the declarations that were provided they just simply don't set out a -- even a colorable claim that these are protected by Kovel and Ackert. Because what each of the declarations says, so the only information that we have from Giants Stadium, is that Goldman was asked to provide financial advice and financial expertise to help Sullivan and Cromwell render legal advice. Nowhere in either of the declarations that were filed is there any suggestion that they acted as any kind of interpreter of any information from the client. And so I think on the face of the opposition, Your Honor can correctly decide that there hasn't even been a colorable claim or colorable opposition to providing these documents.

But having said that, we think an in-camera review is appropriate. We think it's typical in these situations. And we would expect Your Honor to conduct one.

THE COURT: All right. Please proceed. You were at sword and shield when I interjected.

MR. SLACK: Right. So, Your Honor, I think you understand the sword and shield, and so what I wanted to do is talk about the one case that Giants Stadium seeks to rely on in order to make its argument. But that case, the Calvin Klein

Trademark Trust matter, which is 124 F. Supp. 207, doesn't really help it.

In that case, a party sought discovery of communications between a lawyer and a client that was attended by a financial adviser. The court first off affirmed the limited interpreter exception. So I think, again, there's no issue as to the law. The court reviewed the documents in-camera -- and I think that's apropos of what Your Honor just said -- and then determined after review that the financial adviser was in fact interpreting information provided by the client and made that distinction there that there was information being provided by the client that the financial adviser was interpreting. The court did require production of one document there that didn't meet the interpreter test.

And so here, in stark contrast, again, there is nothing in the declarations that say that there was anything different here other than the financial adviser was actually providing financial advice, and that is not protected under Ackert or Kovel. Moreover, if you read on in Calvin Klein towards the end of the decision, it makes it clear that had this situation involved a sword-and-shield strategy where some information was provided and some wasn't that it would perhaps have changed the opinion. So in that respect, I think Calvin Klein actually supports the motion here.

With respect to an in-camera review, we just talked

about that. I would only point out that the cases that are cited by Giants Stadium almost uniformly have an in-camera review. Ackert had an in-camera review. Calvin Klein had an in-camera review. It's perfectly appropriate here.

One last point on the attorney-client privilege, completely independent from the idea of the Ackert and Kovel exception. Now, there's dispute that Goldman had entered into swaps with Giants Stadium that were essentially parallel. There were some different terms with respect to the interest rates, but other than that, they were ISDA master agreement swaps. And at various point in the -- in their papers and in the declarations, Giants Stadium states that Goldman was helping provide financial advice so that Sullivan and Cromwell could interpret loss, and they use that in quotations, for purposes of the ISDA master.

But the definition of loss is typically a uniform concept. And so Goldman having had swaps -- again, almost identical swaps other than the interest rate -- was in an adverse position vis-à-vis this kind of legal advice, that is, what is the definition of loss because they had the same issue with respect to their swaps. And the idea that Goldman could be inside the privilege tent with respect to an interpretation of an ISDA master agreement when it was in an adverse position with respect to an ISDA master, it's arm's length, contractual counterparty, destroys the privilege in and of itself. And so

we suggest and it's in our papers that the fact of adversity here independently destroyed the attorney-client privilege.

There is a suggestion in the Giants Stadium papers that they didn't provide this information as a swap counterparty, as if they could change their hats. Well, we're a swap counterparty and now we're giving this kind of financial advice over here. I think that's pure fiction. I think that if you're adverse, if Goldman is adverse it change its hats and say well, I'm providing this information as a swap counterparty and this information as something else.

A quick word on work product, which I think frankly, Your Honor, just doesn't work here. The law from the Second Circuit in Adelman is very clear that if you would have created the documents regardless of litigation then you -- they're not protected by work product. In other words, what happened here was they purported to terminate the swap and therefore wanted to value it. And if they're valuing the swap and figuring out what loss means for valuing the swap, that work would have been done regardless of whether or not there was going to be litigation over or not. They needed to value the swap for the termination. And what Adelman says is that that is not protected by work product.

The case that they cite, which is a Weil Gotshal case, if you read their block quote says specifically that it doesn't apply if the work would have been done anyhow. So I

think there the one case that Giants Stadium cites is actually right on point there.

So with that, Your Honor, we would ask that you compel the production of these. And of course, Your Honor, we are willing to and expect that you will view them in-camera first. Thank you.

THE COURT: All right. Thank you.

I'll hear from Giants Stadium.

MR. CLARK: Good morning, Your Honor. Bruce Clark for Giants Stadium.

THE COURT: I take it that we're going to continue to call it Giants Stadium and that MetLife has nothing to do with this.

MR. CLARK: That's the entity, Your Honor. We're quite right. That's just a name on the --

THE COURT: I figured as much.

MR. CLARK: -- name on the front. I thought you were going to ask about the game the other day, and I have no answer for that either.

Your Honor, much but not all of what Mr. Slack said we do agree with, including some of the general statements about the law. Originally, they painted our claims of privilege as sweeping. Now they're narrow. We agree with that change in approach.

There are exactly seven families of e-mails that are

at issue, twenty-nine e-mails because you will have one as the original e-mail and then somebody will reply and so forth. It's not a lot of e-mail or documentation. And the subject is the proper interpretation of the term loss under the ISDA agreement. And literally, what happened here is the client presented to its lawyers, some of my colleagues, this ISDA agreement and said how is one to interpret that -- that was the question that was being discussed -- in the circumstances where we have a swap of the nature of the swap with Lehman.

Now, the debtors continue to say that the two swaps were similar or even identical. That simply could not be further from the truth. If you look at all of the filings in this case and all the swaps that have been presented to you, I haven't looked at every one. I've looked at as many as I can over time. I haven't found another like this because typically under the ISDA agreements there are fixed terms and variable terms. The fixed term is self-defining, and the variable term is usually something that is market aware. It's LIBOR, LIBOR plus twenty or something like that.

In the Lehman swap, it was quite different. What Lehman did was come to Giants Stadium and say we can prevent even that amount of risk. And there was risk there under the deal because what the Giants were paying out was an auction rate subject to an auction that would be held every thirty days. And what they were going to have to pay on the bonds --

on the auction rate bonds would depend very much on how the construction was going and a lot of other variables. It was not just a credit issue.

So what happened was Lehman came to the Giants and said we can put you into a secure position where we will make our swap payment the same as your payment on the auction rate bonds. In effect, at the end of the day what you have, Giants Stadium, is a 6.18 percent fixed rate for forty years. And the terms of the contract were quite remarkable in a number of other ways. There are no termination provisions of the type you ordinarily have, no caveats, no ability to get out of that commitment. It was a very unique contract.

And so there was the question of how do you interpret loss under the circumstances presented here after the bankruptcy filing. And loss under the ISDA documentation means an amount a party reasonably determines in good faith to be its total losses and costs in connection with the agreement including any loss of bargain. The benefit of the bargain was an essential element in the ISDA agreement as it is in all of these contracts, but this was an unusual swap. And so the issue was what will the market consider reasonable. What will the market consider reasonable under these circumstances?

And it is a fact that for this limited purpose in this limited respect, Giants Stadium asked Goldman Sachs to give some advice and information to Sullivan and Cromwell so

that Sullivan and Cromwell could advise Giants Stadium. It's the same thing that happened when Wachtell asked Lazard for advice in Calvin Klein, and that was upheld. And if you look at the Hallmark Cards case, although that was a work product case, there's a mention of the fact that Weil Gotshal was claiming attorney-client privilege over twelve documents relating to advice they got from Lusa Data (ph), it's data consultant, which is probably the same theory. This is not unusual. People have arrangements like these on narrow issues all the time.

Now, under the law, the debtors went on at some length about the Ackert case. And of course, the Ackert case does have considerable influence here. But what happened in Ackert is that the trial court barred any questions of Mr. Ackert. David Ackert was interviewed by the trial court in-camera, and the privilege claim there was upheld across the board. There were to be no questions at all, no documents produced at all.

And what the Second Circuit reversed was that broad bar against any questioning. But they went on to say at page 140 of the reported opinion, we do not preclude the possibility that as the examination of Ackert proceeds Paramount might demonstrate circumstances bringing some particular question or questions put to Ackert within the scope of Paramount's privilege.

That's exactly analogous to what we have here. We have turned over three thousand Goldman Sachs e-mails where they sent them or received them or were copied on them. We're raising the narrow issue of how you value loss under these circumstances. Just as in Ackert, we're not claiming -- we're not claiming a general bar against Goldman Sachs production. That's -- we're way beyond that.

THE COURT: Let me ask you this though, I'm being asked to decide a discovery dispute in the middle of a Lehman omnibus hearing. And this may not be unique, but it's the first time I can remember that a discovery dispute has been front and center with a big audience that has -- probably has very little interest in the outcome.

I'm assuming that the parties have acted in the utmost good faith in trying to resolve this and would not have brought this to the Court's attention during prime time were it not viewed by both sides as an incredibly important issue. But how am I supposed to resolve the question, a relatively subtle one, as to the role that Goldman is actually playing in respect of these particular e-mails without, (a) actually seeing the e-mails myself, and (b) perhaps having some further explanation as to what capacity Goldman was fulfilling in connection with what may be ambiguous communications?

As I understand the arguments that have been made, Sullivan and Cromwell and its client takes the position that

Goldman was not here acting purely in its capacity as a financial adviser. But in the declaration cited by Lehman in its argument, one could interpret what has been stated there as classifying Goldman as a financial adviser not as an interpreter.

One of the problems I have in applying the law is that I'm being asked to apply labels that have broad meaning to particular circumstances that may or may not be unique. What is your position as a matter of law as to whether these documents are discoverable if I determine that Goldman is acting in its capacity purely as a financial adviser and not as a, quote, "interpreter" close quote?

MR. CLARK: There are three or four questions there. Let me see if I can answer them in order.

The question you did not ask but alluded to in your opening remark was whether or not the parties have acted in good faith. I think the answer to that is yes. I'm not charging anybody with bad faith. We did offer to meet and confer on these documents before the motion was filed, and that was rejected.

Now, the second -- maybe all your questions are really wrapped up in the last one. I think if you were to conclude -- first of all, I think you should look at these documents in-camera. I agree with that. Once upon a time, a long time ago at a bar association meeting, a lecturer got up

and told the story of a judge who asked to see documents in-camera, and the lawyer claiming the privilege said very well, Your Honor. And the judge looked at him and said that's a waiver. So I don't think Your Honor is going to do that to me, so I don't have any problem with your looking at these in-camera.

I think the third question -- second question you actually asked about whether you need to take some further evidence, I think you should look at the documents first and see if that's necessary.

Your final question, if you conclude at the end of the day that Goldman Sachs was simply acting as a financial adviser and not helping Sullivan and Cromwell advise its client on the market meaning of loss and how that should be interpreted in the work that it was doing and giving advice on, then I think the documents have to be turned over.

THE COURT: Okay. Now, this is difficult because we're talking about a subject with the documents in a black box. I don't know what they look like. I don't know what they say.

What is it about the documents that would lead an impartial observer such as me to conclude that you are right in the interpretation, and let me use the word twice --

MR. CLARK: Okay.

THE COURT: -- that Goldman was acting as an

interpreter?

MR. CLARK: I think when you see the e-mails at issue, the question that is being addressed there is not what's the valuation. As Mr. Slack said, we have produced thousands and thousands of pages, and some hundreds of those are valuation ones. They have all of those.

It's not the question of what the valuation is after you determine what the right process is. It's a discussion about what goes into the process, and I think if you see that, you can understand why there is a different category of document before you.

THE COURT: Okay. I think it's simply too hard to discuss this further without my having a chance to actually see the documents. And I take it you have no objection to that.

MR. CLARK: I don't, Your Honor, no.

THE COURT: Fine. So what more do we have to talk about here since I can't resolve this until I see the documents?

MR. CLARK: Can I have a minute on sword and shield and work product, or do you want to hold off on that, too?

THE COURT: I'm confident you're going to say that you're not using this in the sword and shield way, and that --

MR. CLARK: You read my script, Your Honor.

THE COURT: All right. I'm just guessing --

MR. CLARK: All right.

THE COURT: -- what you might say, and as to work product, I'm not sure that it's relevant, other than for you to make some comment about how these documents wouldn't have been prepared but for the anticipated litigation, but perhaps you're going to say something else.

MR. CLARK: I think they were prepared because of the anticipation of litigation solely. This was a step toward litigation.

THE COURT: So I'm reading your mind, is that what you're telling me?

MR. CLARK: Either I'm communicating very well, or I don't need to say anything more, and I think that may be the case.

THE COURT: Okay. Well, let's then defer further argument on this, until after I've had a chance to review the documents. And so I have some sense as to what burden may be associated with this, what are we talking about in terms of number of overall pages?

MR. CLARK: Maybe forty. I mean, it's not a lot, Your Honor.

THE COURT: Okay.

MR. CLARK: I'm just guessing if I'm wrong, by a factor of sum and sorry, but I can say it's not going to be a great burden to look through these I don't think.

THE COURT: Fine. That's what we'll do. We'll just

have to make a date for the turnover of the documents, making sure that that's done in a secure manner, and on a date when I have a little bit of time, so I can sit and review them.

Now, the question that I have after the review is what happens next. Because conceivably, and I'm guessing this may be like bedtime reading. These may not be the most scintillating documents. Conceivably, I may have questions about the documents, and since you know what the documents contain and I know, as a result of reviewing them and what the documents contain, but debtor's counsel does not yet know, how am I to engage in further dialogue without this being an ex parte communication of one sort or another?

MR. CLARK: Well, I'm not sure that's prohibited actually. If -- again if you look at the Ackert case, what the lower court judge did, was have an ex parte interview with David Ackert. And the Second Circuit did reverse the lower court in some respects, but did not criticize that procedure. So perhaps that's the next step if you think it's necessary.

THE COURT: Well, we'll cross that bridge when we get to it. But if we do get to that point, I'm not going to have the conversation with questions without first giving debtor's counsel notice that this is something I intend to do, and to the extent that I can provide a broad statement of the area of inquiry, I plan to do that as well, so that both parties are fully aware of what I'm doing.

MR. CLARK: I'm sure Your Honor can do that, and we would have no objection.

THE COURT: Okay. Is there more?

MR. SLACK: I want to say literally a minute worth of comments.

Your Honor, I do have an extra copy of the four documents that were produced, and if I could approach and give those to you.

THE COURT: Sure.

MR. SLACK: They're all stapled together, Your Honor, but there are four separate documents there.

The other thing I wanted to say just because I didn't want to leave it hanging, is that we had extensive communications with Giants Stadium by both phone and letter about resolving this, and there were situations where they continued to produce additional documents.

In the last step, Your Honor, even though we didn't meet, we did offer and because this is an investigation, it was more important for us to find or to have the information, than to have some kind of a waiver. We offered to take the documents on a non-waivered basis, and that was rejected by Giants Stadium.

THE COURT: Yeah. I have one last question for counsel. One of the things about presiding over a case like Lehman Brothers is that there are certain disputes that involve

much more money than we're talking about today that just get resolved.

The parties meet, confer, assess the relative risks, and make agreements, thereby providing certainty to the parties and diminishing the overall burden on the Court. As a result, I applaud such agreements.

But there are certain other disputes, this is one, and we're about to hear one in the SIPA case in a moment that just become huge battles with the parties on both sides spending a lot of time and effort dealing with issues that maybe shouldn't get to this level, and I'm not being critical of anybody in saying that we're having a discovery dispute in the middle of a Lehman omnibus hearing, but I can't help but note how exceptional this is.

Clearly at this point in the history of your discovery efforts, you probably know an awful lot about the issues that matter. And what's currently behind the curtain may or may not include a smoking gun. I think we should assume, at least I'm assuming, that there is no smoking gun. And that while there may be some incremental advantage to your seeing the documents, my guess is you're probably not going to know that much more than you already know.

Given that, why is this so important, why is this a matter that requires all of our time and attention this morning?

MR. SLACK: I think that's a fair question, Your Honor, with the following background, which is the debtor really has bent over backwards not to have discovery disputes, which is why this is so unique. We've issued, and I've personally been involved in issuing, you know, more than fifty subpoenas to counter-parties. We've worked diligently, sometimes night and day to resolve disputes, and we've been pretty successful doing it, and will continue to do it.

As I said here, and it's the reason I wanted to get up, we offered to look at these documents for purposes of the investigation on a non-waiver basis. The information was more important than -- you know, than some kind of legal ruling, so we were willing to do that and that was denied.

This particular derivative matter, Your Honor, is a 300 million dollar claim against the estate. So it's -- while granted we have a very large estate here, 300 million is still a very, very large claim within the estate.

There is a question, Your Honor, and it's one that we're looking at as part of the investigation whether, in fact, it's a claim at all, or whether it's a receivable. And so that is -- so the swing here is between not just the 300 million, but also a potential receivable of some magnitude. So it is a significant matter to the estate.

I don't assume anything. I don't know whether the documents that are being withheld are going to have a smoking

gun or not, I just don't know. What I do know is I believe we're entitled to them, and when we didn't have any alternative other than being told we weren't going to see them, or come into the court, it's the first time that I brought a motion to compel in front of this Court on a 2004, again I've done a number of them. So we tried very hard to resolve this short of coming to the Court and were unable to do it.

THE COURT: Okay.

MR. CLARK: We have been trying for over a year to move beyond the debtor's hiding behind 2004 saying they get everything and they give nothing, to a point where we can discuss the merits of this. Anything else I have to say would just be argumentation between counsel and not help the Court, but we have offered to move this along for well over a year.

THE COURT: Okay. I guess my suggestion to the parties would be this, during the period of in-camera review, however long that may be, it seems to me that it would be desirable for the parties to spend a little bit of time thinking about possible resolution of this on the merits. It seems to me to be an issue that is relatively narrow, although one as to which there may be significant areas of disagreement concerning the calculation of loss.

I don't pretend to understand all the issues at this point, but I suspect the lawyers who have been speaking to me today about the discovery dispute already have a deep

understanding of the risks and rewards. I heard the comment about this may be a receivable, suggesting a doubling down on the part of Lehman, and I accept the argument for what it is, argument, but recognize that the substance of this is something that you might be able to address profitably even while I'm reviewing the documents.

MR. CLARK: Thank you, Your Honor.

MR. SLACK: Your Honor, I just want to say the following, is that -- and make a representation that we are, in fact, still involved and still engaged in trying to finish the investigation. And what I don't want to happen, Your Honor, is to engage in some kind of preliminary discussions, and be confronted by an argument by Giants Stadium that by discussing the merits that we're now somehow not entitled to get and finish our investigation.

So if we could get a -- essentially a commitment that they're not going to try to gotcha us if we sit down and talk to them preliminarily before our investigation is finished, then I would certainly be willing to advise my client to sit down with them. But I don't want to be faced with a gotcha.

THE COURT: Okay. You don't even need that commitment because I'm going to give you a gotcha from the bench -- a no gotcha. If you choose to have a conversation that could lead to some kind of productive business-like resolution of this, doing that will not constitute a waiver of

any of your discovery rights or your rights to continue with your investigation as you see fit. And frankly, you could've had such a conversation although it might not have been productive a year ago.

This is to be carried until some further omnibus hearing date after I've had a chance to review the documents, and I'm going to suggest that counsel for Giants Stadium make arrangements directly with my chambers for an appropriate time to turn over the documents. And we'll see where we go from there.

MR. CLARK: Thank you, Your Honor.

THE COURT: Okay.

MR. CLARK: May I be excused?

THE COURT: Oh, yes, you may. That's the end of the contested LBHI docket and we're now into the LBI SIPA proceeding.

MS. SCHWARTZ: Your Honor, may I be excused?

THE COURT: Yes. Anybody who wishes to be excused, may be excused. Maybe we should just take a moment for people's movements to settle down.

(Pause)

THE COURT: Okay. Let's proceed.

MR. MENAKER: Good morning, Your Honor. Richard Menaker, special counsel to the SIPA trustee. The next matter on the agenda is the motion of RBS N.V. and I gather Mr.

Bienenstock will start things rolling.

THE COURT: I think Mr. Menaker was simply acting as transition host for the morning.

MR. BIENENSTOCK: I appreciate that. Good morning, Your Honor, Martin Bienenstock of Dewey & Leboeuf for RBS N.V.

We're here pursuant to RBS N.V.'s motion dated August 2, 2011. The relief requested is an order either dismissing without prejudice the LBI trustee motion dated June 29, 2011 for an order collecting approximately 345 million dollars in interest under an ISDA contract, or converting the motion to an adversary proceeding complaint and making Part VII of the Bankruptcy Rules applicable.

And regardless of which alternative, if any, obviously the Court would choose, we're asking for a stay of everything other than discovery pending determination of the reference withdrawal motion that RBS N.V. filed on August 16, 2011.

I want to assure the Court that we have tried to take into account the Court's ruling in some other matters that have some similarities, but big differences from this, and also, Your Honor's comments just now in the previous contested matter in the other case.

After the teleconference that Your Honor hosted with or Your Honor participated -- presided over between the LBI trustees, attorneys, and ourselves, we submitted a stipulation

that Your Honor had so ordered, which provided for the timing that led to this, and also for potentially a subsequent hearing on the LBI's trustee's motion, but a hearing at which no disputed facts would be determined, and there are many disputed facts.

Perhaps most interestingly since we filed our motion, the LBI trustee did file the complaint that we said the LBI trustee should have filed in the first place to collect money on a contract and served the complaint, and then volunteered, basically unilaterally, that the LBI trustee would toll the time for responding to the complaint because even after having drafted it, filed it, and served it, wanted to come here to say it should not have to prosecute it, it wants to go forward with its motion.

Another development since the teleconference, Your Honor, is that we have already propounded discovery, document discovery so far which goes to the disputed issues. And I think the other development which for obvious reasons I don't want to go into in any detail, but I will say also that the negotiations on the merits have been enlarged from things just between counsel to now, business people meetings, and I won't go further other than to say that they are occurring, and I think on all sides, people are proceeding as I hope -- as I think the Court would want them to proceed.

There is a very easy method, Your Honor, we believe

for this motion to be resolved, and then there's a more complex method that we believe would lead to the same result, and I want to mention the easy method first.

Bankruptcy Rule 9014(c) says the Court at any stage in a particular matter -- the Court may at any stage in a particular matter, direct that one or more of the other rules in Part VII shall apply. There's not even a requirement of cause, there's just the power of the Court to do that.

And because this is a matter where the parties have very different opinions as to what the facts are, and to what certain things mean, and as Your Honor can see from -- I'll go through some of the factual disputes, so Your Honor has in mind what is going to have to be tried, et cetera, and then there's the Stern v. Marshall issue which led to the reference withdrawal motion.

We think it -- there's more than ample cause if there were need for cause in the first place for the Court simply to say, please let -- Part VII shall apply so that the parties can fully vindicate their rights in a matter that is, granted not of the order and magnitude of the Lehman case that Your Honor is proceeding over, but for 345 million plus interest, a matter of significant significance to both my client, RBS N.V. and Mr. Menaker's client.

The disputes, Your Honor, I think are as follows, which would give the Court a good concept of why the parties

are certainly started at very different positions and what's going to lie ahead, regardless of which Court ends up presiding over this. The speech are as follows:

As is shown by the LBI's trustee's initial motion in this matter, they take the position that RBS N.V. owes 345 million dollars under an ISDA contract, has admitted its owing, and the only issue to be decided is whether triangular set-off is enforceable in bankruptcy.

The RBS position is very much different. The RBS position is there is an ISDA contract, but there's also another contract called the terms of agreement. And that contract came into being because in trade confirmations that RBS furnished the LBI over 880 times without objections as they were doing all their trading, those were the terms on which the parties were transacting business. And there are at least two terms of agreement that have particular significance here.

One is that they grant RBS a security interest in all property it holds of any of the LBI and Lehman entities.

THE COURT: Let me stop you right there. That's paragraph 14 I think of the terms of agreement.

MR. BIENENSTOCK: That is correct.

THE COURT: I've looked at it. I also looked at the form of this unsigned apparent adhesion contract created by RBS internally, and I am frankly shocked that you are hanging your hat on so weak a hook. If that's your hook, I'm really amazed

at all of the paper you have generated to suggest that this is a dispute that takes you out of SIM Crude (ph). I am amazed. But go right ahead. I've looked at it. You don't have to go into your merits argument. I'm fully familiar with the facts, we're just going to deal with a narrow motion you're making now on the Part VII rules and what happens to the trustee's motion.

I've also read, by the way, with care, your motion to withdraw reference, and I'll make no comment with respect to it.

MR. BIENENSTOCK: Your Honor, I wasn't coming here to argue the merits of the trustee's motion, but I wanted to in part lay out the different facts in dispute.

THE COURT: I know them. I've read your papers. I don't want to hear them again. At least not now.

MR. BIENENSTOCK: Okay.

THE COURT: I want to hear the specifics of your pending motion.

MR. BIENENSTOCK: Okay.

THE COURT: I'm fully familiar with the facts you allege.

MR. BIENENSTOCK: Then the -- sticking to the procedural motion, Your Honor, as I said a moment ago, there are two methods of resolution. One is under Bankruptcy Rule 9014(c), the Court can make Part VII applicable, and doesn't have to get into any of the individual factual disputes that

the papers raise.

The other does get into the factual disputes because under Rule 7001.1, actions to collect money must be brought by complaint in an adversary proceeding with an exception. And the exception is when the plaintiff is seeking delivery of property which ties into Section 542(a) of the Bankruptcy Code, which is delivery of property of the estate. They both use the word deliver property.

Interestingly, Your Honor, the LBI trustee in his first motion never said that the money that should satisfy the alleged contractual obligation was property of the estate. Very carefully, the LBI trustee said that the LBI contract rights under the ISDA contract is property of the estate. It didn't say the money was.

When we made our motion that they should convert their contested matter to an adversary proceeding, they then made the next argument that they had not made before. They say, oh, no, the money that you should use to satisfy the contractual obligation that they allege, that is property of the estate. They cite -- and that's really what, in a large part, their whole case turns on.

THE COURT: Well, let me break in because I just want to understand the simple and the more complicated way for you to achieve the relief that you're seeking today. I really don't want to get into the weeds, I want to get into the merits

of your motion, and what relief you seek today.

I think the easy way that you had proposed was that the Part VII rules apply by fiat to the trustee's motion. I assume that's what you mean by the easy route; is that correct?

MR. BIENENSTOCK: Yes, sir.

THE COURT: What's the more complicated route?

MR. BIENENSTOCK: The more complicated route is, as I was just saying, to apply 7001.1. Subdivision 1 of Rule 7001, however, turns on whether this is an action to collect money under a contract or whether this is an action for a turnover for delivery of property of the estate. That's what the LBI trustee's opposition to our motion got into. They had not previously said that the money was property of the estate. Now, they are saying that.

So -- and as we pointed out, we were surprised they were saying that because the security interest we get would cause them to have no recovery whatsoever, without any application of bankruptcy law or anything else. And we had possession of the money obviously, it's our money, so you perfect an interest in money by possession, we obviously had that, but they've even lost the ability to challenge that because of the safe harbors and the statute of limitations.

THE COURT: Mr. Bienenstock, I'm not making myself clear. I don't want to hear the particular arguments that you're now advancing. I'm interested in knowing the procedural

route that you are proposing, that is --

MR. BIENENSTOCK: Okay.

THE COURT: -- maybe I misunderstood what your alternative was at the outset, but I don't want to hear the merits of your argument. I've read your papers.

MR. BIENENSTOCK: Okay. So as I've said, other than by fiat, using Rule 9014(c), the other way to get to the same result is under Bankruptcy Rule 7001, Subdivision 1 an action to collect money under a contract is -- must be brought by complaint in an adversary proceeding, it's that simple. They're arguing the exception to that subdivision. So that's why I have to get into the nitty gritty I got into, Your Honor, but that's -- they didn't argue it originally.

Also, Your Honor, having argued the exception in that subdivision, they're nevertheless still not bringing a claim in their motion or in their filed complaint under 542(a), so they're being internally inconsistent. If they really believed the money we should pay them is already their property, then the right vehicle is 542(a). They don't have a 542(a) claim pending. They've now cited for the first time 542(b) in their opposition and in their complaint, 542(b) is to pay money owing under a contract.

Now, to support their argument that it's -- the money owing is property of the estate, they cite Nimco and they cite Amhall (ph), Nimco being a Southern District decision and

Amhall being Eastern District. In each of those cases, the party owing the money agreed it owed it under the contract. It simply wanted to know who to pay it to, and because there were conflicting claims to it.

When that happens, that money can be considered property of the estate. Here where RBS is saying we have security interest reasons independently that would let RBS win. We have triangular set-off that would let RBS win. There's no agreement under the contract.

What they say is our consent is they cite half in a misleading way of our Section 6(d) statement. The part of the 6(d) statement that says on ISDA alone, approximately 345 million was owing, but the beginning of the sentence is, before getting to set-off which includes the security interest, that amount would be owing. Once you apply those things, there is no admission, consent, or anything like that, with the monies owing.

We've -- I now want -- so under either way, Your Honor, we think by fiat, simply because it's fair, or under Rule 7001, effectively the reason we think Your Honor could -- should rule for us on both reasons, albeit -- although only one is necessary, is that for them to prevail on their 7001.1 exception, they basically have to prove their whole case, and this is not the time for them to prove their whole case. Because until such time as they prove that the money we're

holding is actually their money, they can't win on their procedural argument.

So it's relatively circular, but since this is not the time for the factual disputes to be determined, and because the ISDA contract is governed by UK law, the terms of agreement by New York law, they raise all these things in their opening motion, Your Honor.

The Court for this procedural hearing would have to go through all of those factual disputes to rule on the 7001 issue if their exception is to prevail. But under 9014(c), the Court doesn't have to resolve any of those contested issues.

THE COURT: Have the parties on their own attempted to simplify what you are complicating? Because it's very obvious to me, Mr. Bienenstock, from the review of your papers, that you are engaged in an issue proliferation exercise, rather than an issue simplification exercise. I'm not going to comment on my views now because it's premature of some of the things you've said in your papers, but I'm concerned for reasons that are somewhat similar to comments made at the end of the Giants statement argument with regard to discovery, that the parties here, despite the fact that you say there's been signs of progress at the business level, are not making this simple, but instead creating straw men here and in the district court to somehow take this out of what is really a fairly standard dispute that I hear and determine routinely.

You don't have to dispute that. I'm just saying it. So what I want to know is not the merits of creative arguments, but rather what you have done, if anything, to try to resolve the procedural conflicts that you have created.

MR. BIENENSTOCK: Well, sure, Your Honor. When we received their motion, we engaged in a colloquy by telephone. We explained our position. When that didn't work, Your Honor presided over the teleconference I mentioned. After that we reached a stipulation. After that we were pleasantly surprised that they actually did file a complaint. What we were not pleasant surprised at, and which is what Mr. Menaker will obviously explain to Your Honor is having filed the complaint, where they've changed their claims, they've obviously thought about this some more, and now have different legal theories, they still want to come here and argue they shouldn't have to go forward with the very complaint they filed. And we're not sure why they did that, but as I mentioned earlier, the good news was that in 2008 or 9, when the LBLI trustee first raised this issue, we answered on the merits comprehensively sent them a letter.

The next thing that happened was, a year went by, no response. Then they asked for a tolling agreement which doesn't just toll the statute of limitations, it basically says don't litigate, we want to resolve it.

THE COURT: You're going in the wrong direction, Mr.

Bienenstock. I don't want to hear about what happened over the years. I want to know what, if anything, has been done by the parties to try to deal with today's procedural reality. Today's procedural reality being that there is a trustee motion and there is a parallel adversary proceeding with overlapping issues. You clearly have the right to discovery in the adversary proceeding. To what extent has there been any consensual behavior by the parties to try to resolve your Part VII rules' proposal, which is the easy path to resolving your pending motion.

MR. BIENENSTOCK: Your Honor, we've -- on the RBS side, we feel like we did everything we could. We started discovery and we excluded discovery from the stay we're requesting precisely because we don't want to delay. We explained all our theories first orally and when they didn't work, you know, in writing to the trustee.

As I -- I'm somewhat stumped, Your Honor, because I don't know why when they went to the trouble of filing their complaint, they still insisted on coming here and arguing, they shouldn't have to -- they don't want to prosecute it, they want to go back to their motion.

THE COURT: Let me ask you another question, Mr. Bienenstock. Why do you need a stay and why do you think the stay is appropriate, particularly if it carving out discovery, what is the behavior within the contested matter that you're

concerned about?

MR. BIENENSTOCK: That I can answer. According to the stipulation that Your Honor so ordered, the LBI trustee comes here, I think it's on October 20th, and although the stipulation says no contested disputed facts will be determined, they are going to be seeking judgment on the merits. And we have outstanding discovery, with due respect, Your Honor, we think that the terms agreement, et cetera, I won't go into it, have been accepted by the Second Circuit before, that these are part of the contractual relations among the parties. They're obviously disputed because in the LBI trustee's initial motion, he knew about them. We told -- we were candid, and he tries to take issue with them, but notwithstanding the factual disputes between the parties, he's made crystal clear as evidenced by the stipulation Your Honor so ordered that he wants to show up on October 20 on the merits.

There's no summary judgment motion pending or anything like that. I don't think there could reasonably be, given the outstanding discovery, and the factual issues, but that's why we need the stay.

Now, we don't mean, as Your Honor sees, to slow anything down. We already started our discovery. The reference withdrawal motion we made, he's responded, our reply is due in a few weeks, nothing is being done to slow anything

down.

THE COURT: So is your request for a stay really a request for an adjournment sine die pending the outcome of your motion to withdraw the reference? Is that what this is?

MR. BIENENSTOCK: Well, and discovery so that we can be ready for the ultimate either summary judgment or a hearing on the merits.

THE COURT: I don't know what you mean by and discovery. I'm trying to understand, as plainly I can why you want the stay, and I think what you said was, you want the stay so that the trustee is not permitted to proceed on the merits of his motion.

MR. BIENENSTOCK: That's one reason.

THE COURT: Is there another reason?

MR. BIENENSTOCK: Yes. Because we need -- he might proceed by summary judgment. He -- using the motion forum as opposed to the adversary proceeding he hasn't moved for summary judgment.

THE COURT: So are you, in effect, seeking what amounts to a procedural hat trick in which you deal with issues relating to your Stern v Marshall arguments in the district court, deal with the issues that concern you on the merits here, only in the context of the adversary proceeding, which prevents full discovery, or third point, in the context of a transformed contested matter practice that takes on the form

that you want, but it includes manifest discovery rights and other procedural protections. Is that the hat trick that you seek, meanwhile nothing happens in the bankruptcy court that bothers you --

MR. BIENENSTOCK: No.

THE COURT: -- get it all your way, is that what this is about?

MR. BIENENSTOCK: No, Your Honor. And very specifically -- Your Honor, respectfully I submit just got it wrong. We read Your Honor's order and decision in the Lehman JPM dispute, and we specifically tailored everything we're doing, so as not to be in the position where we're even suggesting that we're saying we can win here, but not lose here.

So let me go -- this is very important obviously what Your Honor just raised, and I want to make our position very clear. We've said from the outset, we filed a proof of claim, their first in underwriting loans or some such thing, having nothing to do with the trustee's counterclaim. They filed their counterclaim in the form of the contested matter motion. We said at the outset, this is a Stern v. Marshall issue, you're collecting contract damages, we're entitled to an Article 3 forum to exercise the essential attributes of judicial power.

We are moving for reference withdrawal, basically to

vindicate our rights under Stern v. Marshall. It is clear, unlike perhaps in the other matter, that the facts that they need in this contested matter are different than our proof of claims, so resolving our proof of claim can't resolve this contract dispute.

We are dealing with the reality, Your Honor, that while we have strong beliefs that Stern v. Marshall applies, that this matter is here until a Court says it's not here. So what we have come to court here with, is a requested procedure that will not slow things down, so that either court that ultimately hears this, will not be slowed down. We've started our discovery, we just want to be able to -- like in any case for 345 million dollars, we want to be able to take the discovery that's reasonable and that we're entitled to.

If they move for summary judgment, we want to be able to show that there are disputed facts, but to some extent, we need discovery for that. We also need it for the ultimate hearing on the merits. And frankly, Your Honor, I have no -- I don't understand how perhaps the Court came to the conclusion that we're here for some kind of hat trick, everything in our favor, nothing in theirs. We're doing everything we can simply to get ready for trial, in whatever court that happens in.

THE COURT: Maybe you misunderstand my --

MR. BIENENSTOCK: I must have.

THE COURT: -- use of a metaphor that may not be

correctly applied to what I view as a triple play. The three things that you are engaged in involve one, a transformation of the contested matter, which has been filed against your client, dealing one way or the other with the adversary proceeding, which involves some different claims, and then dealing in a third proceeding in the withdrawal of reference.

I didn't say that you were engaged in a strategy that's inappropriate. I didn't say that you were doing anything that was inconsistent with your duties to your client. But if I connect what I've just said to something I said earlier, you'd engaged in issue proliferation, that's hard to deny but you don't have to say anything in response to it.

I view what you are doing as complicating in as many ways as you can creatively do it consistent with Rule 11, what started out as a standard issue, relatively standard issue, motion to enforce the automatic stay and to seek recovery of damages, you've sought to distinguish that, we don't need to get into the merits.

I'm simply saying that a relatively plain vanilla procedural start has been transformed into a matter of enormous complexity, mostly through your design. My concern --

MR. BIENENSTOCK: I would say it's the opposite.

THE COURT: My concern is that the parties not proliferate the issues, but rather manage the issues, hence my earlier question which got sidetracked as to what you have done

within the context of this case to make it easier, smoother, more efficient, as opposed to just the opposite, which is what I have perceived.

No merits conversations, please, I don't want to hear any of your merits arguments.

MR. BIENENSTOCK: I'm not --

THE COURT: I've read them. I've evaluated them. But I haven't made up my mind with respect to them.

MR. BIENENSTOCK: Your Honor, the first thing I must say in response to what you just said is, what you characterize is the standard stay enforcement, we think is a horrible abuse. There is no way the motion can ever get to the stay issue without deciding the contract issue, and they're camouflaging that this is an action on a contract, a Northern Pipeline action as an excuse to make it seem like a contested matter in a court proceeding.

THE COURT: We don't need to get into characterizations here.

MR. BIENENSTOCK: Okay. But --

THE COURT: I'm simply urging --

MR. BIENENSTOCK: So what we've done is --

THE COURT: I'm urging that in the context of this case now, that the parties actually try to make some progress as opposed to gaming the system.

MR. BIENENSTOCK: Well, okay. We obviously disagree

vehemently that we gamed the system as opposed to number one, made sure that we can assert and vindicate all of our defenses. Your Honor calls that proliferation of issue, we call it -- I call that, we have defenses, we want to be able to assert them fairly.

Number two, Your Honor can tell from everything we've done, it's been quick, it's been timely, we're getting ready for the ultimate resolution. That's what we're -- that's the best answer I can give Your Honor to your questions, what are we doing to resolve this. We are getting ready with all the facts to get to the ultimate resolution in whatever court we're ultimately told is going to make that determination.

THE COURT: Okay. I think I've probably heard enough unless there's more you want to add at this point. I'd like to hear from Mr. Menaker.

MR. BIENENSTOCK: That's it, Your Honor.

MR. MENAKER: Your Honor, if Your Honor please, may I address the last question you asked, which is that I think it's fair to say that off the record the trustee and counsel for the trustee and RBS and its counsel get along very well, and have had productive discussions and there's productive activity going on.

This started back in March, long before any proceeding began, you don't want to hear the history of that, but -- and since the proceedings began, I have to say that

dealings between the parties, off the record, have been appropriate, I believe. I think the Court would be pleased to know how we have proceeded.

On the record it is inexplicable to me that there should be a cascade of ad homonyms, in papers which you've heard just now and a few remarks that were made are a shadow of that of what has actually appeared in the papers. I was personally accused in a letter that came to Your Honor of engaging in discourtesy. I don't understand that. But I can tell you that it does have an impact on our ability to confer about making the procedures work simply and effectively and get the job done without a multiplication of the proceedings.

THE COURT: Let me then ask you a very, very pointed and I think uncontroversial question. The narrow procedural issue presented by the motion is stop the freight train of your motion for relief under the automatic stay to compel payment, and incorporate into that motion practice procedural safeguards from the Part VII rules. Is that or is that not a problem from the perspective of the trustee?

MR. MENAKER: Of course not. We have no problem with importing all possible and available procedural safeguards under Part VII, to the extent appropriate in the circumstances of the case.

One thing this case doesn't need is any discovery because -- may I respond to your question by referring to the

merits for a moment?

THE COURT: Look you may. One of my -- my comments earlier about the merits represented a desire on my part to focus on the substance of the motion practice on today's calendar, which is a purely procedural motion. And to the extent that we have contagion of the facts bleeding into the procedural aspects of this, this simply becomes an opportunity for lawyers to argue matters that I have read and don't want to hear about today.

I understand that RBS has a whole host of arguments designed to take this out from the umbrella of triangular set-off and designed to identify other procedural arguments that create potential leverage. I think I see what's going on. That doesn't mean that I'm in any way dismissing the validity of the points made. But I will recognize that it's the first time in three years that some of these arguments have been identified as potential arguments, and Northern Pipeline was the law long before Stern v. Marshall.

So I don't want to get into those merits. I don't want to talk about the terms of agreement. I don't want to talk about the merits of the dispute. I want to talk about how we can solve today's problem.

MR. MENAKER: All right. Your Honor, I'll take that as guidance. And first, on the matter of -- I think there's really two parts to the motion that RBS has before the Court

today.

One is whether the 9014 contested matter is appropriate. I'll say parenthetically that the adversary proceeding is sitting in abeyance, it is a protective submission, it is intended to sit there, not -- we've stipulated that it sits there, we do nothing with it, we wait to see what can be accomplished on the simpler 9014 approach. If it can't be done that way, then we can move quickly forward on the adversary proceeding. It is not in play at the moment. I want to emphasize that, and they know that, and we have a stipulation on that, and they don't have to do anything on it until X number of days after there's a ruling with regard to what we're dealing with here.

THE COURT: Okay. So does that mean that if that's being held in abeyance and you have no objection to the incorporation of the Part VII rules, that you have what amounts to an agreement, although you didn't talk to each other about it, as to how the contested matter will proceed?

MR. MENAKER: I have -- the answer on that is yes. And you're correct that we didn't talk about it, and I think that the approach here is that the Part VII rules are, in large part, always included under Part IX or under a 9014 proceeding. And anything else in Part VII that is appropriate here, and if it were to turn out the discovery were appropriate, we would certainly go forward with discovery on it, we don't think any

discovery is appropriate, we don't think there's any issue of fact.

THE COURT: Okay. What's your position with respect to the request that this be stayed?

MR. MENAKER: Well, the default under 550.11(c) is no stay. We start with that proposition. Just because you're worried about what's happening in the bankruptcy court and you decide to go to the district court and say you were going to withdraw the reference, which by the way is not a withdrawal of reference under 157 here. This is a SIPA proceeding, so it's a revocation of the removal that they would be seeking. That may be as a practical matter, a distinction without a difference, but I'm not sure that it is. But we needn't get into that today.

This is here on a mandatory removal under 78(eee)(B)(4). It didn't come here under the judiciary act. It didn't come here under the standing order. And that is a factor that certainly the district court would have to consider on this motion.

THE COURT: I assume you're briefing that to the district court.

MR. MENAKER: We were briefing that --

THE COURT: We don't need to get into that here.

MR. MENAKER: We're briefing that separately, yes.

But we start with the proposition there should be no

stay. So there's a hurdle. The burden is on the moving party to show that a stay is really needed. And there's standards for that. I mean RBS has said that there are matters of judicial efficiency, institutional considerations, it's wrong for there to be two proceedings, one here, one there at the same time, a state of affairs of which they are responsible for. That is not the basis upon which a stay ought to be.

Granted, a stay must be granted or may be granted, discretion -- on the Court's discretion if the standards that are established in the cases are satisfied. In the first item is likelihood of success on the merits. So -- and I say this very respectfully, Your Honor, on the issue of the stay, you do have to give some consideration to whether there's any merit in the removal grounds that have been asserted.

And this is as a core a core proceeding as could be imagined. It is a routine matter. We're dealing with a motion that's been made for enforcement of the stay, and it's not just the 362(a) stay, there's also stays in the liquidation -- SIPA liquidation order.

THE COURT: Let me break in for one second. Mr. Bienenstock in his papers argues that you have the wrong set of standards in mind when you talk about, in effect, traditional grounds for the grant of the stay pending appeal, and likely the success on the merits is actually not one of the standards I need consider, instead it's a broad discretion having to do

with -- I won't put words in his mouth, but I'm going to use the words, literally an efficient case management in light of the fact that the motion for withdrawal of the reference is pending, and I have the ability, although I may not choose to exercise that ability, to hold everything in abeyance while the district court chooses to act on the pending motion.

I have other matters currently pending where there are motions to withdraw the reference pending, and I have not issued any stay. So one of the real questions here is why I should or should not stay this particular contested matter while a creative motion to withdraw the reference is pending before the district court.

MR. MENAKER: Two aspects of that observation. The first is the cases that are cited by RBS in support of its reduced standard approach to stay are twenty years old or more. A much more recent case is the Dana, In Re: Dana Corp. from 2007 from this court, which flatly states each of the standards that are traditional standards for a stay.

I believe their standards for a stay, I mean, that seems to be the law currently. Maybe it's some years ago, two decades ago there were some cases that were -- took a more discretionary approach, or a -- it's not more discretionary, a loser approach on whether there are standards. But there are clearly standards.

And it also does make sense, Your Honor, to consider

whether this range of arguments that have been made, a number of those arguments were presented to you in the motion that's before you now. You have also seen now the full panoply of arguments that have been made in the district court. They're not going to win in the district court says I. I don't know, but I think this Court might well conclude, I think this Court should conclude, there is very little likelihood of success on the merits, on the motion to withdraw.

And on that ground alone, it would be a mistake to exercise your discretion and put this off for what could be months in order to await the ruling. I suspect actually it will not be months. I suspect that the decision will come down more rapidly than that, and we have put in our opposition papers yesterday in the district court, and I believe this matter comes on with a reply at the end of this month, so it's going to be heard rather rapidly.

THE COURT: Okay. This is a matter that has been on the backburner for quite a while. How is the trustee prejudiced if this matter is stayed here pending the determination of the motion to withdraw the reference, thereby giving us at least clarity as to the right procedural forum for disposition of these issues? And I ask that particularly in light of your last --

MR. MENAKER: I understand exactly.

THE COURT: -- comment which indicated that this is

probably not going to be a particularly time-consuming process of determining once and for all whether the motion filed by RBS has any merit.

MR. MENAKER: First, I think it would be fair to say that there was a passage of time from when the issue first arose of the Section 6(d) statement which admitted a 347 and then asserted the triangular set offs came in May of 2009. That's eight months into the liquidation, and there was considerable back and forth that went on right after that. There's an exchange of letters, some of which appears in the papers.

This matter then was told last February we were engaged with special counsel and we moved rather rapidly and communicated with counsel for RBS, and there were discussions about meeting. There were discussions over the phone, and then there was a meeting in the spring, a face-to-face meeting with counsel, so there was considerable activity. So to call it -- at this point, this spring it's no longer on the backburner. And it's only after a considerable back and forth that in June, the motion was brought. And the motion was brought on a reasonably, on a fast-tracked basis. In other words, it was not an adversary proceeding, it was a motion.

For the reason that the trustee has made a commitment that was announced at the state of the estate presentation, that the trustee wishes to make a substantial distribution in

2012, perhaps in the spring of 2012, and 347 less a million five, which is the set-off we acknowledge, so 345 million dollars, which really ought to be in the hands of the trustee is of significance to the trustee in that regard.

So there is harm. It's not just -- it's not harm to the trustee, it's harm to the customers, it's harm to the beneficiaries of the work that the SIPA trustee does in this liquidation. And while we're not talking about billions of dollars, we're talking about a substantial enough amount of money that it makes a difference.

THE COURT: Okay.

MR. MENAKER: I do want to say a word about the reference to Enron creditors that appears in the papers, and that showed up in the reply, and that we did not see in the opening papers.

I don't want there to be any mistake about Enron creditors and how it could conceivably apply in this case. Your Honor's expression suggests that maybe I don't have to say anymore about that.

THE COURT: Okay. Well, apparently I have a transparent expression on my face. Mr. Bienenstock, do you want to say anything more?

MR. BIENENSTOCK: Thank you, Your Honor, very briefly.

First, I think just as the scheduling we had

originally requested, we have to resort to ask the Court for a teleconference to get it resolved. Here Your Honor always creates a better, I guess, environment because the LBI trustee has now agreed, I think, if I heard right, that the Part VII rules can apply. The easiest way to apply them is to go forward with his filed complaint, that is one of the rules that we proceed by complaint, but that might resolve it.

As for the stay, perhaps I should've said the obvious because the obvious is the most easiest to overlook. The Court that grants the stay in this case we're asking Your Honor, controls it. So as I explained earlier, our concern is only to be able to take appropriate discovery and vindicate all our substantive rights at the trial.

If things got -- are taking too long for whatever reason Your Honor could always revisit it. But given the LBI trustee's stated and written intent to basically get judgment on the merits on October 20 before we've had our discovery et cetera and before presumably the district court will have had an opportunity to have oral argument and rule, that concerned us. And so if the Court grants a stay, it's obviously subject to the Court's ability to revisit it whenever the Court believes is appropriate.

There were many comments Mr. Menaker made that I don't think are well taken or correct, but I don't have the feeling Your Honor really wants to spend the time at this

hearing for that type of back and forth. So I think the critical part is, if I heard right, we have an agreement that there should be an adversary proceeding, and Your Honor has heard the --

THE COURT: That's not what --

MR. BIENENSTOCK: -- arguments on the stay.

THE COURT: That's not what Mr. Menaker said. I think what he said was, that the adversary proceeding is being held in abeyance, that the contested matter may be one in which Part VII rules apply to the extent applicable. I believe that's what he said, but he needs to confirm that I have correctly --

MR. BIENENSTOCK: Well --

THE COURT: -- stated what I think he said.

MR. BIENENSTOCK: Okay. One of the things that I would take issue and will now with what Mr. Menaker said is the adversary proceeding being held in abeyance. He filed it and served it. He then unilaterally volunteered a tolling of the times to respond. It's out there. We don't understand why we just shouldn't respond to it and that we can -- especially since it has different claims, which apparently are, after they thought through things, what they'd rather proceed on, it ought to be the vehicle that we go forward on, and if -- even if all Mr. Menaker said or meant to say was Part VII should apply to the contested matter, the easiest way to accomplish that is to

go forward on the complaint; otherwise, do we answer the motion as if it were a complaint or not, and we have that type of question which should be unnecessary.

And on the stay as I think I explained, to us since Mr. Menaker spoke to -- the Court has to look to probability of success, as I said earlier, we filed a proof of claim for underwriting loans, they filed this contract action. Yes, they put a stay on top of it, but they -- you don't know if there's a violation of the stay or not until you decide the underlying contract action. We think Stern v. Marshall clearly applies, and the probability of success is very significant. And frankly, in none of Mr. Menaker's papers has he explained why that's not the case.

THE COURT: Let's limit the current back and forth to the question of what Mr. Menaker said, and whether or not we're dealing with the contested matter as to which Part VII rules will be deemed to apply, or whether or not we're dealing with an adversary proceeding.

It's obvious that Mr. Bienenstock would prefer that the contested matter be held in abeyance, and that the adversary proceeding be the vehicle for determining the rights of the parties, but he's the defendant and he doesn't get to choose.

MR. MENAKER: I don't want to have to tell the trustee that I was the victim of a gotcha. The fact is that we

would like to proceed with the contested matter under 9014 and are happy to have such Part VII rules as may be appropriate, either because they're mandatorily included within 9014, or because they're appropriated included for the purposes of this matter.

We have not brought a contract action. We have brought an adversary proceeding in abeyance in parallel with our contested matter with the same predicates, so that's not correct. And I hope it is clear that by saying that we are willing to have Part VII rules apply, the next thing I will here will not be, oh, you have admitted that you've given up your contested matter and you are now proceeding only as an adversary in the matter. That is not what we have said.

MR. BIENENSTOCK: Your Honor mentioned I'm the defendant and I don't get to choose. There are two matters they have commenced. We could join issue on the adversary proceeding, in that sense I guess we can choose, but we don't want to play the games.

Procedurally, Your Honor, we're just looking at what is the best way to get ready for resolution with the least disputes. We know how to answer the complaint. We can move our answer, et cetera, know how to take discovery, there are rules for summary judgment.

On the motion that he thinks should be heard on the merits on October 20, I explained already, that we can't deal

with. There we can't be fairly prepared. We will not have had adequate discovery and we don't know what further response to file to it until we have had adequate discovery. So it's a little disingenuous to say, well Part VII can apply to the extent appropriate. What's the extent appropriate? We'll constantly have these disputes. It's just much easier to go forward with the complaint. Their complaint, they drafted it, they didn't have to do it. They drafted it, they filed it, they served it.

THE COURT: Okay. I'm going to rule with respect to the RBS motion. Everything that has been said on the record that relates to the merits of the dispute plays no role in determining this purely as a procedural matter.

It's obvious to the Court that from the very early days of this contested matter, counsel for RBS has been eager to come up with a procedural device that would allow RBS to assert a host of defenses to the trustee's motion that would take it out of the ordinary stay violation context.

Nothing that I'm about to say is designed to limit in any way RBS's rights to raise whatever arguments and defenses it feels appropriate, regardless of whether that is occurring within the context of the contested matter first initiated by the trustee, or in the context of the adversary proceeding more recently initiated by the trustee.

The motion brought by RBS is styled in a manner that

dictates the nature of the relief that I need to issue. One is a request that the trustee's motion be dismissed without prejudice or that alternatively that motion be converted to an adversary proceeding complaint. That aspect of the RBS motion is denied.

It is denied in part because the trustee has already brought an adversary proceeding complaint that in effect responded to the invitation made by RBS in this motion. RBS didn't get exactly what it asked for, but it did get an adversary proceeding.

The motion also asks that there be what amounts to incorporation of the protections otherwise available to a defendant in an adversary proceeding within the contested matter originally commenced by the trustee. I treat the statements made by counsel on the record today, although if you read the transcript it may not look like a clean agreement, as an agreement by the trustee that the Part VII rules, to the extent applicable, will be deemed to apply to the contested matter brought by the trustee.

By virtue of these rules being incorporated by reference into the contested matter, RBS should be in a position to pursue all appropriate discovery. I make no judgment as to what discovery is appropriate at this point, and to have all of the procedural protections otherwise available in an adversary proceeding context.

As to the request that there be a stay of all non-discovery related proceedings in respect of this motion brought by the trustee pending a determination of the motion to withdraw the reference which is now pending in the district court, I deny the request for a stay. There's no basis for a stay.

I also believe as a matter of general practice that it is inappropriate for motions for withdrawal of the reference that are predicated on Stern v. Marshall to produce, except in extraordinary circumstances, a stay of proceedings in the bankruptcy court.

As Mr. Bienenstock acknowledged in his comments, unless and until the motion to withdraw the reference is granted, this Court controls its docket in those matters that the parties choose to file that are ultimately assigned to me.

In the wake of Stern v. Marshall, there are many motions to withdraw the reference that have been filed. Not only in this court by all over the country. I do not predict outcomes, but as to this outcome I am confident in making the following prediction. Not all of those motions will be granted.

In a setting in which the parties are seeking to exploit to the extent there is an advantage in exploiting it, Stern v. Marshall for procedural advantage, it is a genuinely bad idea for there to be a practice of staying matters in the

bankruptcy court pending the outcome of those motions.

There's another reason for denying the request for a stay, however, and it's probably a much more significant rationale. I have the power as does every bankruptcy court judge, notwithstanding our Article 1 status to manage my docket in the interests of justice, and I intend to do just that.

There's no need for a stay to protect the interest of RBS. If RBS has a legitimate grievance of any sort, and an argument to be made regarding an adjournment of the hearing set for October or any other month for that matter, I will consider that. There's no need to stay proceedings, especially in an environment in which RBS itself is carving out a stay of discovery from its requested stay.

In other words, the litigation is going to proceed in all respects as it would up to the date of hearing, and I view this request as a disguised request for a continuing adjournment of what RBS must view as the most coercive aspect of the present motion brought by the trustee, the potential for an adverse determination with respect to a stay violation.

We will hear that when the Court is ready to hear it. That may be in October. That may be later. But I encourage the parties as I tried to do earlier in today's hearing to see if they can't reach agreements outside of the courtroom, as well as in the courtroom, particularly as these agreements relate to the orderly administration of this dispute.

I will accept an order consistent with the ruling I just made, and would hope that the parties could agree as to the form of that order.

We are adjourned until the two o'clock adversary calendar unless there's anything more from the parties.

MR. BIENENSTOCK: Your Honor, may I ask a question? The stipulation that Your Honor so ordered says something to the effect of subject to the Court's ruling today RBS would respond to the motion and then there's a hearing scheduled I think for October 20. So the immediate question is what that means. We've already propounded discovery but can't possibly completed and it's not the final discovery, to get ready for a hearing on the merits. Is it fair for us to assume that the meaning of the Court's ruling today is the -- those times have to be changed to something we -- hopefully the parties can agree on?

THE COURT: Not necessarily. The parties can agree to change the dates, absent any agreement to change the dates, it's listed for hearing on October 20th. At the hearing on October 20th, assuming you show up and make the argument that you're prejudiced in going forward because you don't have the discovery that you need to be prepared, I will presumably consider that as a request for adjournment.

If the parties meet and confer concerning the literal handling of the case as I suggested in my remarks, you might

come up with a new schedule. And if you don't, I'll see what I'll do with the time, but I'm not predicting now what I'm going to do a month from now.

MR. BIENENSTOCK: I was just trying to avoid further dispute. Because the stipulation also says that at that hearing, no disputed facts will be determined.

THE COURT: If the stipulation which I so ordered continues to be in effect and is not changed either by agreement of the parties or as a result of a contest of its meaning by order of the Court, that would no doubt control. But to the extent that the stipulation fairly read does not apply to the current state of facts including the incorporation of the Part VII rules as described in my remarks, I'm assuming that the parties will try to make the current stipulation work in the context of the case as it is evolving.

I don't know that I can be any clearer than that, and I certainly don't intend to give you a prediction today as to what I'm going to be like in October.

MR. BIENENSTOCK: Thank you.

THE COURT: Is there anything more?

We're adjourned until two o'clock.

(Recessed at 12:29 p.m.; reconvened at 2:05 p.m.)

THE COURT: Be seated, please. Good afternoon.

MR. MCCARTHY: Good afternoon.

THE COURT: Let's start with Soffer.

MR. MCCARTHY: Good afternoon, Your Honor. My name is Ed McCarthy on behalf of Lehman Brothers.

THE COURT: Were you on the phone last time?

MR. MCCARTHY: I was. I was, Your Honor.

THE COURT: Welcome to the courtroom.

MR. MCCARTHY: Thank you very much and thank you for having me.

This morning, Your Honor, we're here to set a schedule for moving forward in the Fountainebleau matters. We've worked since the last hearing with opposing party, and we have agreed to a stipulated schedule. We're here today to ask the Court to issue a consent order on that schedule.

THE COURT: Okay. What do I need to know about it, and does it apply to all the cases or only to the first one?

MR. MCCARTHY: The first two cases.

THE COURT: Okay.

MR. MCCARTHY: If you'd like, Your Honor, I can approach with it.

THE COURT: Sure. What do you have to tell me about it?

MR. MCCARTHY: I don't think we have much to discuss. It's fairly straight forward, Your Honor. We attempted to be aggressive with it, move these cases forward, which we would both like to do.

THE COURT: And what's happening with proceedings in

Nevada?

MR. MCCARTHY: The proceedings in Nevada in the Towne Square litigation, Lehman Brothers has foreclosed through a non-judicial foreclosure process. There -- we've talked to opposing counsel about this, who we didn't see any emergency there to respond, because through the non-judicial foreclosure process, there's no need to respond until the sale is set. That won't be set until December through an agreement with the parties. That's a different case than the case before Your Honor.

THE COURT: Okay.

MR. MCCARTHY: So --

THE COURT: And that one is not on for today?

MR. MCCARTHY: It is not, Your Honor. We will be here next month on that for opposing counsel's motion to seek relief from the automatic stay in that case.

THE COURT: Okay. Any comments from the defendant's perspective?

MR. MAJOR: Not much, Your Honor, there's any questions. And it's Chris Major for the defense.

THE COURT: All right. I have no questions. And if this is in electronic form, I'll enter the order.

MR. MCCARTHY: We can submit it to Your Honor in electronic form.

THE COURT: I can't do anything with a piece of

paper.

MR. MCCARTHY: Of course, of course.

THE COURT: And I take it this is something that you're satisfied with on behalf of your clients?

MR. MAJOR: Yes, Your Honor. It's the product of much back and forth between plaintiff and defendant.

THE COURT: Okay. Fine.

MR. MCCARTHY: We'll submit it then as soon as this is done.

THE COURT: Fine. I'll enter it then.

MR. MCCARTHY: Thank you.

THE COURT: Thank you.

MR. MAJOR: Thank you, Your Honor.

MR. WIN: Good afternoon, Your Honor, Zaw Win from Weil Gotshal and Manges for the debtors.

The final item on today's agenda is an adversary proceeding of Melissa King versus Lehman Brothers Holdings, Inc., Case No. 11-10875, and it's the debtor's motion to dismiss, which is docketed at UCF No. 8.

The debtor's motion to dismiss is uncontested, but before going into the substance of the motion, it may be helpful to provide the Court with a little bit of background information on this matter.

As the Court may recall, Ms. King failed to appear at the July 20th hearing on the debtor's motion for a temporary

stay of the adversary proceeding. Following entry of the order, of that order, granting the temporary stay, the debtors contacted the Chapter 13 trustee in Ms. King's case which is pending -- which was at the time pending in the United States Bankruptcy Court for the Northern District of Georgia.

The Chapter 13 trustee provided the debtors with an additional service address for Ms. King in Pasadena, California, and the debtors served copies of the order granting the temporary stay of the adversary proceeding, as well as this motion on both that address and the address in Mableton, Georgia.

Additionally, since the July 20th hearing, Ms. King's Chapter 13 case has been dismissed, and I understand from local counsel that LBHI has successfully executed on its writ of possession and taken title to and possession of the property in Georgia. No objections or other responsive pleadings were filed to this motion. And unless Ms. King is here today, the debtor's motion appears to be uncontested.

Unless the Court has any questions, the debtors respectfully request the motion to dismiss be granted.

THE COURT: Let me inquire if Melissa King is present in the courtroom or participating by telephone conference.

I hear no response. And so she's not here to informally oppose your motion to dismiss. I would ask if you've had any contact with her since the last time this case

was listed for the adversary docket?

MR. WIN: We haven't. We haven't gotten any response from her, either formally or informally.

THE COURT: And are you satisfied that you have a reliable address for her in Pasadena, California?

MR. WIN: It's the address that was provided to us by the Chapter 13 Trustee who informed us that she had received it from Ms. King. So it's the best address that we have.

I would note that Ms. King brought this adversary proceeding, and it does seem to us that she has some responsibility to inform us of how to reach her in connection with it.

THE COURT: All right. Since the adversary proceeding principally relates to the property which now has been taken over by Lehman in Georgia, that's correct?

MR. WIN: That's correct.

THE COURT: In effect, the subject matter of the complaint appears to no longer be current. The likely reason, although I can't look into this pro se plaintiff's mind that she brought the complaint, was to try to hold on to the property in a different way since that appears not to any longer be applicable, I gather, but don't know, that she may have abandoned this action.

I will grant the motion to dismiss, as unopposed. But if it should turn out that there is some fundamental defect

in the service, and Ms. King is able to come into court at some reasonable time in the future demonstrating that she did not have actual or constructive notice of today's proceeding, I'll certainly give consideration to any argument she may make at that time. However, I will enter the proposed form of order if you have one.

MR. WIN: Thank you, Your Honor, we'll submit one this afternoon.

THE COURT: Fine. We're adjourned.

(Whereupon these proceedings were concluded at 2:12 PM)

I N D E X

R U L I N G S

I N D E X, continued

I N D E X, continued

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.

Aliza Chodoff

Digitally signed by Aliza Chodoff
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